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Supreme Court, U.S.
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No. 94-1954

In The

Supreme Court of the United States

October Term, 1994

JEWELL KISSINGER and GLADYS KISSINGER

Petitioners,

v.

ARKANSAS STATE HIGHWAY COMMISSION

Respondent.

Petition For Writ Of Certiorari To Review Decision Of Eighth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a suit commenced under 42 U.S.C § 1983 seeking damages against the sovereign State of Arkansas is barred by the Eleventh Amendment.

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STATEMENT OF THE CASE

The Complaint filed below was an action under 42 U.S.C § 1983 for inverse condemnation seeking damages from the Respondent, the Arkansas State Highway Commission ("Highway Commission"). The United States District Court for the Eastern District of Arkansas granted the Motion To Dismiss filed by the Highway Commission and the Petitioners, Jewell and Gladys Kissinger ("Kissingers"), appealed. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal of the Kissingers' Complaint, holding that such an action was a suit against the State of Arkansas and, as such, was barred by the Eleventh Amendment.

In their Complaint, the Kissingers alleged that in the late 1987 and early 1988 the Highway Commission damaged, trespassed upon, and took their property while widening the existing State highway adjacent to their property. It was alleged that such action was done without prior notice or the initiation of condemnation proceedings in State Court and that such action violated their Constitutional rights. The Kissingers originally lodged their action before the Circuit Court of Craighead County, Arkansas. The Circuit Court held that such an action against the Highway Commission was suit against the State of Arkansas and dismissed for lack of jurisdiction. After the dismissal of the action in Circuit Court, the Kissingers filed their action before the Arkansas State Claims Commission. The Arkansas State Claims Commission conducted an evidentiary hearing in which the Kissingers appeared and were represented by counsel. The Claims made specific findings of fact and ruled the

Kissingers' claim that the Highway Commission unlawfully took their land was invalid and therefore denied. The Claims Commission found that the Kissingers should be compensated for damages to their property in the amount of $13,000.00 and presented the award to the Arkansas General Assembly for subsequent approval and payment.

On November 13, 1993, the Kissingers filed a Complaint against the Highway Commission in the United States District Court for the Eastern District of Arkansas, alleging their inverse condemnation action under 42 U.S.C. § 1983 seeking monetary award. The District Court dismissed their Complaint and the Eighth Circuit affirmed the District Court's dismissal of the Kissingers' 42 U.S.C. § 1983 action, ruling that such an action was a suit against the State of Arkansas, and as such, was barred by the Eleventh Amendment of the Constitution of the United States.

BRIEF AND ARGUMENT

The Petitioners herein, Jewell and Gladys Kissinger ("Kissingers"), filed a Complaint in the United States District Court for Eastern District of Arkansas, asserting jurisdiction under 42 U.S.C. § 1983 seeking damages against the Arkansas State Highway Commission ("Highway Commission") The Eighth Circuit Court of Appeals affirmed the District Court's dismissal of the Kissingers' Complaint filed under 42 U.S.C. § 1983 because the Kissingers were seeking monetary damages from the Highway Commission and such an action was a suit

against the State of Arkansas; therefore the action was barred by the Eleventh Amendment of the United States Constitution.

The Highway Commission is an agency of the State of Arkansas created by the Arkansas Constitution and charged solely with the administrative control of the Arkansas Highway and Transportation Department. See Ark. Const. Amend. 42 § 1, (Michie 1987) (creation and powers); Ark. Code Ann. § 27-65-102 (Michie 1994) (control of Highway Department); Ark. Code Ann. § 27-65-107 (Michie 1994) (powers and duties). Thus, a suit against the Highway Commission is a suit against the State of Arkansas. *Austin v. Arkansas State Highway Comm'n*, 320 Ark. 292, ___ S.W.2d ___ (1995); *Tri-B Advertising, Inc. v. Arkansas State Highway Comm'n*, 260 Ark. 227, 539 S.W.2d 430 (1976); *Bryant v. Arkansas State Highway Commission*, 233 Ark. 41, 342 S.W.2d 415 (1961). A suit against the Highway Commission is a suit against the State of Arkansas and as such the suit is barred by the Eleventh Amendment of the Constitution of the United States. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 663 (1974); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984); *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988); *Williams v. Missouri*, 973 F.2d 599 (8th Cir. 1992) (per curiam); and *Light v. Blackwell*, 474 F.Supp. 333 (E.D. Ark. 1979), aff'd mem. 620 F.2d 307 (8th Cir. 1990).

Absent consent or Congressional abrogation, a suit in which the State or one of its agencies or departments is named as a defendant is proscribed by the Eleventh Amendment. *Pennhurst*, (465 u.s. 89); see, e.g., *Florida Dept. of Health and Rehabilitated Serv. v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981) (per curiam); *Alabama v.*

Pugh, 438 U.S. 781 (1978) (per curiam); *Missouri v. Fiske*, 290 U.S. 18 (1933); *Williams*, 973 F.2d 599.

Also it should be noted that the scope of Article III of the United States Constitution did not extend federal jurisdiction to suits against a sovereign State by a citizen of that State. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held a Federal Court could not entertain a suit brought by a citizen against its own State. After reviewing the Constitutional debates concerning the scope of Article III, the Court determined that the federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution nor in establishing the judicial power of the United States." *Id.* at 15. See also, *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964); *Employees v. Dept. of Public Health & Welfare*, 411 U.S. 279 (1973); and *Edelman*, 415 U.S. 651.

The principle of sovereign immunity has been held to be a Constitutional limitation on the federal judicial power established in Article III:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State or by citizens or subjects of a foreign State because of the Eleventh Amendment; and not even one

> brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification.

Ex parte State of New York, 256 U.S. 490, 497 (1921). See also, *Pennhurst*, 465 U.S. at 98.

The Court explained in *Edelman v. Jordan* that:

> The historical basis of the Eleventh Amendment has been oft stated, and represents one of the more dramatic examples of the Supreme Court's effort to derive meaning from the document given to the Nation by the Framers of the Constitution. Nearly 200 years ago, a leading historian of the Court tells us:
>
> "The right of the federal judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject the deep apprehension and an act of debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new federal government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted."

1C Warren, The Supreme Court in United States history 91 (Rev. Ed. 1937). *Id.* at 660.

Petitioners offer nothing by way of legal argument or legal precedents of any Court that suggests that the jurisdiction of federal courts extend to suits commenced under 42 U.S.C. § 1983 seeking damages against an agency of a sovereign State. In light of Rule 10 of the Rules of the Supreme Court of the United States, the Court could expect the Petitioners to direct attention to

conflict between the ruling of the United States Court of Appeals for the Eighth Circuit rendered herein and decisions, if any, rendered to the contrary by the United States Supreme Court, by any United States Court of Appeals, or by any State Courts of last resort. Nowhere within their Brief and Argument do the Petitioners reference any precedents or legal authority which suggests that either Congress has abrogated the Eleventh Amendment proscription of suits against a sovereign State, or that the State of Arkansas has consented to suits in the federal courts. This omission is glaring in light of Rule 10, and the holding from which they seek review, wherein the United States Court of Appeals for the Eighth Circuit held, to-wit:

> Because the Kissingers have not shown that either of the exceptions to the Eleventh Amendment are applicable, their suit is barred.

To date, Petitioners neither assert that Congress has abrogated the Eleventh Amendment nor that the State of Arkansas has consented to be sued in federal courts.

Although the Petitioners' basis for federal jurisdiction of a suit against the State of Arkansas remains unstated and unclear, the assertions of Respondent and the law are clear that the Highway Commission is an agency of the sovereign State of Arkansas, and as such, the suit commenced in the District Court pursuant to 42 U.S.C. § 1983 is a suit against the State of Arkansas, barred by the Eleventh Amendment of the Constitution, and not contemplated by the framers of the Constitution within the scope of the federal jurisdiction under Article III of the Constitution of the United States. Congress has not

abrogated the Eleventh Amendment nor has the State of Arkansas consented to suit in federal court.

In *Edelman v. Jordan*, the Court specifically held that 42 U.S.C. § 1983 did not abrogate the Eleventh Amendment immunity of the States. In a sequel to *Edelman v. Jordan*, *Quern v. Jordan*, 440 U.S. 332, 345 (1979), the Court held:

> By contrast, § 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of State liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. Nor does our reaffirmance of Edelman render § 1983 meaningless in so far as States are concerned.

Further, in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), the Court held that neither States nor State officials acting in their official capacities are "persons" within the meaning of § 1983. See also, *Williams v. Missouri*, 973 F.2d 599 (8th Cir. 1992).

In determining whether a State has waived from suit its immunity from suit in the federal courts, the Court in *Edelman v. Jordan*, pronounced the following test, to-wit:

> In deciding whether a State has waived its Constitutional protection under Eleventh Amendment, we will find waiver only where stated "by the most expressed language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."

Murry v. Wilson Distilling Co., 213 U.S. 151, 171 (1909) *Id.* at 673.

Moreover, in *Pennhurst*, the Court held: "A State's Constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." 465 U.S. at 99 (emphasis in original).

Thus, a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own Courts. *Id.* at 99 n.9.

Clearly, the State of Arkansas has not waived its sovereign immunity or consented to be sued in the federal courts. In fact, the State has not waived its immunity in its own Courts. Article 5, Section 20, of the Arkansas Constitution provides that "the State of Arkansas is never to be made defendant in any of her Courts." Further, Ark. Code Ann. § 19-10-204(a) (Michie 1994) provides:

> Except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions, but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the State.

Thus, the sovereign State of Arkansas maintains its sovereignty as a matter of its own Constitutional mandate. There is no authority in the law to waive the State's immunity to suit, and the State of Arkansas is not bound in by the unauthorized acts of its agents or erroneous construction of law by its representatives. *Pitcock v. State*,

91 Ark. 527, 121 S.W.2d 742 (1909); *Arkansas State Highway Comm'n v. Lasley*, 239 Ark. 538, 390 S.W.2d 443 (1965).

In this action, the Kissingers allege that a portion of their property was damaged due to work performed by the Arkansas State Highway Commission when it widened the existing State highway, that the property was taken by the Highway Commission, and that such an act violated their rights under the Fourteenth Amendment of the United States Constitution and Article 2, Section 22, of the Arkansas Constitution.

As noted by the District Court for the Eastern District of Arkansas, the fact that the State is alleged to have converted the Kissingers' property prior to a deprivation hearing does not violate Kissingers' due process rights. In *Bailey v. Anderson*, 326 U.S. 203, 205 (1945),

> It has long been settled that due process does not require a condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity in the Courts of condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.

Even if as alleged, the Highway Commission had taken their property without prior notice or prior hearing, post-deprivation notice and hearing are sufficient to protect landowners' due process rights. In *Harris v. Missouri Conservation Comm'n*, 790 F.2d 678 (8th Cir. 1986), the court held that post-deprivation notice and hearing were sufficient to protect the landowners' due process rights. Further, in *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir. 1984), the court held that the landowner could maintain a § 1983 action premised on the unlawful

taking of property in light of remedies available under the laws of Arkansas for compensating property owners whose property is alleged to have been taken for public use. The Court therein stated:

> Thus, it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the Constitution without providing prior notice, hearing or compensation so long as there exist an adequate mechanism for obtaining compensation.

Id. at 1314.

The State of Arkansas provides adequate State remedies to aggrieved landowners. A landowner has available remedies through the Chancery Courts of Arkansas where the State may be enjoined from taking property until just compensation is provided therefor. *Austin v. Arkansas State Highway Comm'n*, 320 Ark. 292, ___ S.W.2d ___; *Flake v. Arkansas State Highway Comm'n*, 251 Ark. 1084, 476 S.W.2d 801 (1972); *Arkansas State Highway Commission v. Partain*, 192 Ark. 127, 90 S.W.2d 108 (1936).

Further, an aggrieved landowner may seek a retroactive monetary award through the State Claims Commission. It has been consistently held that the remedies available by way of prospective injunctive relief through the Chancery Courts and for a retroactive monetary award through the Arkansas State Claims Commission afford aggrieved parties an adequate State remedy and satisfy the due process requirements of the Constitution of the United States and the Constitution of the State of Arkansas. *Austin v. Arkansas State Highway Comm'n*, 320 Ark. 292 ___ S.W.2d ___; *Fireman's Ins. Co. v. Arkansas State*

Claims Comm'n, 301 Ark. 415, 784 S.W.2d 771 (1990), cert. denied, ___ U.S. ___, 111 S.Ct. 76, 112 L.Ed.2d 50; *Roesler v. Denton*, 239 Ark. 462, 390 S.W.2d 98 (1965), and *Light v. Blackwell*, 474 F.Supp. 333 (E.D.Ark. 1979).

If, as alleged by the Kissingers, in the latter part of 1987 and the early part of 1988, the Highway Commission in widening the existing highway adjacent to their property acted in such a manner so as to constitute a taking of their property in violation of their Constitutional rights, then the laws of the State of Arkansas provide an adequate State remedy by virtue of prospective injunctive relief available through the Chancery Courts of Arkansas as a means to prohibit the State agency from taking property without the initiation of statutory condemnation procedures. The laws of Arkansas further provide a means for obtaining a retroactive monetary award for property taken or damaged by the State, and provide a claim procedure and evidentiary hearing before the Arkansas State Claims Commission. Ark. Code Ann. § 19-10-205-210 (Michie 1994). Further, the laws of Arkansas afford parties dissatisfied with the sum of an award of the Claims Commission the right to appeal to the General Assembly of the Legislature of the State of Arkansas.

The Supreme Court of Arkansas stated in *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*:

> Since the act creating the Claims Commission grants the power of review only to the legislature and without question delegated the Commission duties which are, under the Constitution, solely the duties of the General Assembly, the Claims Commission proceedings

> are vast proceedings of the General Assembly and not subject to the provisions of the Administrative Procedures Act.
>
> Appellants are obligated to seek review by the General Assembly under the Claims Commission rule promulgated by the Commission under the authority of the General Assembly. Appellants have elected to bypass those rules and proceedings and seek direct review by the judicial system without exhausting remedies provided by the Claims Commission.
>
> Appellants have no standing to argue a denial of due process unless and until they have exhausted their procedural remedies. See *Bar v. Arkansas Blue Cross and Blue Shield, Inc.*, 297 Ark. 262, 761 S.W.2d 174 (1988). In this instance, the remaining remedy is a review by the General Assembly.
>
> Since we hold that the Claims Commission is an arm of the General Assembly and the General Assembly has total control over the determination of, and subsequent funding for, payments of the 'just debts and obligations of the State' – all other avenues for redress through legal proceedings being barred by the sovereign immunity provision of the Constitution – appellants' argument that the State Claims Commission system, without provision for judicial review, violates separation of powers is without merit.

Id. at 458.

In the instant case, the Kissingers did not avail themselves of the remedy available through the Chancery Courts for prospective and injunctive relief. Rather, they filed an action for monetary damages in the Circuit Court

of Arkansas in contravention of Article 5, Section 20 of the Arkansas Constitution, and the suit was dismissed on October 1, 1990, by the Circuit Court of Craighead County, Arkansas. Further, the Kissingers appeared and were represented by counsel at an evidentiary hearing wherein their claims were presented before the Arkansas State Claims Commission. The Arkansas State Claims Commission found that the "right of way" issue to be invalid and denied that part of the claim, but awarded the sum of $13,000.00 as compensation for damages to the Kissingers' property. The award of $13,000.00 was presented to the 80th General Assembly, 1995 Legislature, for subsequent approval and payment. The Kissingers were afforded due process of law by virtue of the State mechanisms afforded under Arkansas law.

Finally, the Kissingers failed to pursue and avail themselves of their right to appeal of decisions of the Arkansas State Claims Commission to the General Assembly of the State of Arkansas and have attempted to bypass such an appeal and seek redress in the federal courts. Failure of a party to avail themselves of the right of appeal afforded by the State constitutes a bar to redress for alleged deprivation of property without due process in the federal courts of the United States. See *Harris v. Missouri Conservation Comm'n*, 790 F.2d at 681; *Collier v. City of Springdale*, 733 F.2d at 1316; *Butler v. City of North Little Rock*, 980 F.2d 501, 505 (8th Cir. 1992).

In conclusion, Petitioners make no assertion consistent with Rule 10 of the Rules of the Supreme Court of the United States that decisions exist which are contrary to the decision rendered of the United States Court of

Appeals for the Eighth Circuit herein. It is well established in the law that the Highway Commission is an agency of the sovereign State of Arkansas, and as such, the damages action of the Petitioners under 42 U.S.C. § 1983 is barred by the Eleventh Amendment and outside the scope of federal jurisdiction under Article III. It is well established in the law that in enacting § 1983 Congress did not abrogate the Eleventh Amendment; and that the sovereign State of Arkansas has not waived its immunity from suit in federal courts. Further, it is well established that the laws of Arkansas provide adequate State remedies for the Kissingers' through prospective injunctive relief in the Chancery Courts of Arkansas, a retroactive monetary award before the State Claims Commission, and review by the General Assembly of the State of Arkansas.

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APPENDICES

IN THE CIRCUIT COURT OF
CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

JEWELL KISSINGER ET UX.,
PLAINTIFFS

vs. NO. CIV 89-69

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

On this 1st day of October, 1990, comes on to be heard the motion of defendant, Arkansas State Highway Commission, to dismiss the complaint filed herein against it and the response thereto of plaintiffs, Jewell Kissinger and Gladys Kissinger; upon consideration whereof, and after hearing argument of counsel, the Court is of the Opinion that this action by plaintiffs constitutes a suit against the State of Arkansas and that the Court lacks jurisdiction to hear same.

IT IS THEREFORE CONSIDERED AND ORDERED that the motion of defendant should be, and is hereby, granted, and that this cause must be, and is hereby dismissed without prejudice.

/s/ Gerald Pearson
Circuit Judge
10/16/90

Precedent Prepared By:
/s/ Philip N. Gowen
Attorney for Defendant

1995 Legislature

STATE CLAIMS COMMISSION DOCKET

Amount of Claim $50,000.00 Claim No. 91-399C-CC

Jewell Kissinger & Gladys Kissinger Claimant

vs.

AR State Highway Department Respondent State of Arkansas

Date Filed October 18, 1991

Attorneys

Keith Blackman, Attorney Claimant
Mark Whitmore, Claims Attorney Respondent

Type of Claim Unlawful taking of property and Attorney Fees (+)

FINDING OF FACTS

The Claimants, Jewell and Gladys Kissinger, represented by Mr. Keith Blackman, Attorney-at-Law, and the Respondent, Arkansas State Highway Department, represented by Mr. Mark Whitmore, Staff Attorney, were present at a hearing on April 21, 1992.

At the 1992 hearing the Claims Commission directed the parties to discuss the cost of a new driveway onto Claimant's property. The Claimants were directed to obtain at least three estimates on the cost of a driveway and provide the estimates to the Respondent. Also at the 1992 hearing the Claims Commission unanimously held the "right-of-way" issue involved in the claim to be invalid and denied that part of the claim.

After receiving driveway and other damage estimates from the Claimants and comment from the Respondent the Claims Commission does now unanimously find Respondent liable for damage to Claimant's property in the amount of $13,000.00. Therefore, the Claims Commission unanimously awards this claim in the amount of $13,000.00, and **will present this claim to the 80th General Assembly, 1995 Legislature, for subsequent approval and payment.**

The Claims Commission strongly recommends that in the future the Arkansas State Highway Department notify all adjacent landowners, by mail, before proposed construction begins of the name and address of any project contractor(s) and how to proceed with claims against said contractor(s) for any alleged damage they cause to the owner's property.

IT IS SO ORDERED.

CONCLUSION

The Claims Commission unanimously approves this claim in the amount of $13,000.00, and hereby directs the Claims Commission Clerk **to submit a Special Claims Bills covering payment to the 80th General Assembly, 1993 Legislature, for subsequent approval and payment.**

Date of Hearing April 21, 1992.

Date of Disposition August 10, 1993.

/s/ Diane Pieroni
Chairman

/s/ Ron Owens
Commissioner

/s/ Robert Handley
Commissioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JEWELL KISSINGER AND GLADYS KISSINGER
PLAINTIFFS

vs. NO. J-C-93-378

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

Presently before the Court is Defendant's Motion to Dismiss (Doc. #7). In 1987 and 1988, the Defendant's portion of Plaintiff's property was damaged due to work performed by the Defendant on its adjacent land. Plaintiffs assert that their property was taken by the Defendant without due process of law in violation of the 14th amendment of the U.S. Constitution and Article II, § 22 of the Arkansas Constitution as it was done over Plaintiff's objections.

The initial complaint was filed in the Circuit Court of Craighead County, Western District, Arkansas on February 14, 1988, asserting that the Defendant failed to compensate Plaintiff for its condemnation of their property and subsequently violated their constitutional rights. The Circuit Court of Craighead County held that a suit against the Arkansas State Highway Commission is a suit against the State of Arkansas and thus dismissed the case for lack of jurisdiction.

Pursuant to A.C.A. § 19-10-101 et seq., Plaintiffs filed a complaint with the Arkansas State Claims Commission. A.C.A. § 19-10-204(a) provides as follows:

> [e]except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the State.

The Arkansas State Claims Commission held that Plaintiffs' "right-of-way" claims were invalid but awarded $13,000.00 for driveway and other damages. Plaintiff contends that the Arkansas State Claims Commission failed to rule on the constitutional issue contained in their Complaint and thus this Court is the appropriate forum for consideration of the issue.

Defendant's Motion to Dismiss is based upon the following arguments: (1) the suit is against the Arkansas Highway Commission which is an agency of the State of Arkansas, thus, the suit is barred by the 11th Amendment to the Constitution of the United States; (2) the Arkansas State Claims Commission and the General Assembly have exclusive jurisdiction over monetary claims against the State of Arkansas pursuant to Article 5, § 20 of the Constitution of Arkansas. A.C.A. § 19-10-101 et seq.; and Section 6 of Act 462 of the Acts of Arkansas of 1949; (3) there is an adequate state remedy; (4) the Complaint fails to state a claim upon which relief can be granted; (5) the Complaint fails to state grounds upon which jurisdiction is asserted; (6) due to the award by the Arkansas State Claims Commission these procedures are barred by application of the doctrines of Res Judicata, Collateral Estoppel, Waiver, Laches and Statute of Limitations; and (7) the Plaintiff has failed to exhaust all available state remedies.

Although the named Defendant in the suit is the Arkansas State Highway Commission, service was made upon the individual members of the Commission. A suit against the Arkansas State Highway Commission or its individual members in their capacity as Commissioners is a suit against the State of Arkansas. *Edelman v. Jordan,* 415 US 651 (1974); *Light v. Blackwell,* 472 F.Supp. 333 (E.D.Ark. 1979). Thus it is barred by the Eleventh Amendment to the United States Constitution. Although this finding is dispositive of the suit, the Court will address the Plaintiff's due process arguments.

This is an inverse condemnation action as it is brought to recover damages resulting from work performed on land owned by the Defendant and adjacent to Plaintiff's land. "[A]n inverse condemnation action . . . is not permitted in Arkansas in view of the remedies available in the chancery courts in way of injunctive relief and in the State Claims Commission for monetary damages." *Id.* at 337. Thus, this action is distinct from one in which an individuals property is taken by eminent domain and the owner is given the opportunity to argue before a jury as to the value of the land. The fact that the state converted Plaintiff's property prior to a deprivation hearing does not violate Plaintiffs' due process rights.

> [I]t has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.

Bailey v. Anderson, 326 U.S. 203, 205 (1945) (citations omitted).

"[P]ost deprivation notice and hearing are sufficient to satisfy the requirements of constitutional due process . . . ". *Harris v. Missouri Conservation Com'n.* 790 F.2d 676, 678 (8th Cir. 1986).

The Plaintiffs were not deprived of due process as equitable relief through the chancery court was available to the Plaintiff prior to the property conversion and compensation through the State Claims Commission was available after the conversion, *Light* at 336. The Plaintiffs received a post deprivation hearing before the Arkansas State Claims Commission on April 21, 1992 thus their constitutional due process right was not violated. Defendant's Motion to Dismiss is granted.

It is SO ORDERED this 19th day of August, 1994.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or (a) FRCP on 8-23-94 by MFK.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3237

Jewell Kissinger; Gladys Kissinger, Appellants,

v.

Arkansas State Highway Commission, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[UNPUBLISHED]

Submitted: February 21, 1995
Filed: February 28, 1995

Before FAGG, MAGILL, and BEAM, Circuit Judges.

PER CURIAM.

Jewell and Gladys Kissinger appeal the district court's[1] dismissal of their 42 USC § 1983 damages action against the Arkansas State Highway Commission (the Highway Commission). We affirm.

The Kissingers alleged that part of their land was wrongfully taken by the Highway Commission when it exercised a right-of-way it held. The Kissingers alleged this act violated their rights under the Fourteenth

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[1] The Honorable Stephen M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas.

Amendment and the Arkansas Constitution because the Highway Commission failed to provide them sufficient compensation or due process. The district court dismissed the action, concluding it was a suit against the State of Arkansas, and as such, was barred by the Eleventh Amendment.

Absent consent or Congressional abrogation, "a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Williams v. Missouri*, 973 F.2d 599, 599-600 (8th Cir. 1992) (per curiam) (Eleventh Amendment immunity bars suit absent two exceptions, Congressional abrogation or state waiver.) "[A] state agency which is the sole creation of the state has no separate identity, and thus cannot be stripped of it's [sic] official character."

Glick v. Henderson, 855 F.2d 536, 540 (8th Cir. 1988) (Eleventh Amendment barred injunction against Arkansas Board of Corrections). The Highway Commission is a state agency created by the Arkansas Constitution and charged solely with the administrative control of the Arkansas Highway and Transportation Department. *See* Ark. Const. Amend. 42 § 1 (Michie 1987) (creation and powers); Ark. Code Ann. § 27-65-102 (Michie 1994) (control of highway department); Ark. Code Ann. § 27-65-107 (Michie 1994) (powers and duties). Thus, the district court correctly concluded the Kissingers' action is a suit against the State of Arkansas.

Because the Kissingers have not shown that either of the exceptions to the Eleventh Amendment are applicable, their suit is barred. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (state's waiver of immunity must be "express" waiver); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 66 (1989) (state is not a "person" within meaning of section 1983; section 1983 did not abrogate states' Eleventh Amendment immunity).

The dismissal is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.